

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JERMAINE L. GIBBS,)	
)	
Petitioner,)	
)	
v.)	Case No. 2:21-cv-445-ACA-GMB
)	
WARDEN KENNETH PETERS,)	
et al.,)	
)	
Respondents.)	

MEMORANDUM OPINION

The magistrate judge entered a report recommending that Jermaine L. Gibbs' petition for writ of habeas corpus be dismissed with prejudice. (Doc. 14). The magistrate judge found that the petition is untimely, statutory and equitable tolling do not apply, and there was no argument that Mr. Gibbs is actually innocent of the crime of conviction. (*Id.* at 5–9). The magistrate judge further found that any alleged structural error that occurred during the preliminary hearing did not excuse the untimeliness of the petition. (*Id.* at 9).

Mr. Gibbs filed an objection to the report and recommendation. (Doc. 15). In his objection, Mr. Gibbs concedes that his petition is untimely (*id.* at 2) but contends that the court should review it because his due process rights were violated when he did not have counsel at his preliminary hearing (*id.* at 15 at 2–6). As the magistrate judge's report explains, there are only three gateways for review of an otherwise

untimely § 2254 petition: statutory tolling, equitable tolling, and actual innocence. There is no exception for an alleged structural error. Accordingly, Mr. Gibbs's objection is **OVERRULED**. (Doc. 15).

After careful consideration of the record in this case and the magistrate judge's report, the court **ADOPTS** the report and **ACCEPTS** the recommendation. Consistent with that recommendation, the court finds that the petition for writ of habeas corpus is due to be **DISMISSED WITH PREJUDICE**.

A final judgment will be entered.

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotation marks omitted). The court finds Mr. Gibbs's claims do not satisfy either standard.

DONE and **ORDERED** this December 6, 2022.



ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE